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Supreme Court of the United States

OCTOBER TERM, 1935

No. 387

NOBLE-TROTTER RICE MILLING CO., INC.,
PETITIONER,

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND SUPPORTING BRIEF THEREON.

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Attorney for Petitioner.

McCOY, KING & JONES,
Lake Charles, La.,
Of Counsel.

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No.....

IN THE

Supreme Court of the United States

NOBLE-TROTTER RICE MILLING CO., INC.,
PETITIONER,

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA, RESPONDENT.

PETITION OF NOBLE-TROTTER RICE MILLING CO., INC., FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

The petitioner, Noble-Trotter Rice Milling Co., Inc., respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, to hear this cause prior to its decision by the Circuit Court of Appeals and to review the decision of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, entered in this cause on October 28, 1935, and further to review the decision of the Circuit Court of Appeals in denying

the application of petitioner for a preliminary injunction pending the appeal of said cause in said Circuit Court of Appeals. Petitioner respectfully shows this Honorable Court:

1.

Questions Presented.

(*a*) Is the so-called Agricultural Adjustment Act, as amended on August 24, 1935, constitutional?

(*b*) Does Section 21(d) of said Act deprive petitioner of an adequate remedy at law?

(*c*) Does Article 3224 R. S. or Section 21(a) of said Act forbid the granting of an injunction when petitioner has no adequate remedy at law?

(*d*) If Section 21(a) of said Act forbids an injunction in a case where petitioner has no adequate remedy at law, is said Section 21(a) constitutional?

(*e*) If Congress may constitutionally deprive the Courts of jurisdiction to enjoin the collection of illegal taxes and at the same time deprive the taxpayer of any legal remedy to recover such illegal taxes, may the summary proceedings provided in Sections 115 to 131, Title 26, U. S. C., as amended, be constitutionally employed for the collection of such illegal taxes?

2.

Summary Statement of the Matter Involved.

Petitioner owns and operates a rice mill at Lake Charles, Louisiana. Under the Act of the 73rd

Congress, P. L. No. 10, approved on May 12, 1933, as amended, known as the Agricultural Adjustment Act, there is imposed a processing tax of 1c per pound upon the first processing or milling of rough rice. The amount of tax shown to be due by petitioner in its return filed for the month of September, 1935, was $17,331.90. This tax was due and payable to respondent on October 30, 1935. October 28, 1935, petitioner filed its bill in the District Court to restrain the collection of this tax and any tax which might become due in subsequent months on the ground that said tax was unconstitutional, that petitioner was without adequate remedy at law, and that without such injunction it would be irreparably damaged. (R. 2.) Respondent filed a motion to dismiss on the ground that the Court had been deprived of jurisdiction by Art. 3224, U. S. R. S., and Section 21(a) of the Agricultural Adjustment Act. (R. 54.) Seven similar suits were consolidated with this by Court order (R. 58) and the Court heard at the same time petitioner's motion for a preliminary injunction and respondent's motion to dismiss for want of jurisdiction. At the hearing petitioner introduced two affidavits in support of its allegation that, due to the peculiar nature of the rice business, it was impossible to accurately determine the profit or loss resulting from the processing and sale of any given lot of rice. (R. 60, 65.) The affidavits further showed that it is impossible to prove what part, if any, of the processing tax is passed forward to the consumer or back to the producer or what part is borne by the miller. Respondent intro-

duced the joint affidavit of three deputy Internal Revenue Collectors which affidavit was inconsistent with the affidavits of petitioner in only one respect. (R. 75.) At the conclusion of the hearing the Court denied petitioner's motion for a preliminary injunction and granted respondent's motion to dismiss upon the ground that the Court was deprived of jurisdiction by Article 3224, U. S. R. S., and Section 21(a) of said Act. (R. 79.) Said Article 3224* and Section 21(a)* forbid the granting of an injunction to restrain the collection of any tax, and of the processing tax here involved, respectively. Under Section 21(d)* of said Agricultural Adjustment Act it is provided that no tax collected under the Act may be recovered except upon proof satisfactory to the Commissioner of Internal Revenue that the payer of the tax had not, directly or indirectly, included such amount in the price of the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee of the commodity, and that the price paid by the taxpayer for the unprocessed commodity was not reduced by any part of such amount. The bill below, and supporting affidavits, show the manner in which rough rice is milled and the manner in which it is sold, and that from any given lot of rough rice many different grades and qualities of clean rice are produced. The usual and customary method of selling rice is to sell it on samples made up of mixtures of different lots of clean rice which in turn are derived from differ-

*Set out in Appendix to Brief.

ent lots of rough rice purchased from different parties, and when an order for clean rice is received, based on any particular sample, the miller fills the order of clean rice from a mixture from various lots of clean rice. Many sales are made during a given season made up of various mixtures of clean rice, and there is practically an unlimited combination of lots of clean rice that go into the various sales. There is no way of accurately allocating to the various lots of rice going into any given mix any definite part of the price received for the entire mix. (R. 16-21.) Petitioner's sworn bill and affidavits showed that for these reasons it is impossible for petitioner or any other rice miller to make the proof required for recovery of the tax paid, if the law be held unconstitutional, even if it were otherwise possible to make such proof. Petitioner's sworn bill alleged that unless the injunction prayed for was granted: (1) It would be without adequate remedy at law to recover the taxes paid in the event they be held unconstitutional; (2) if any legal remedy existed, it would entail a multiplicity of suits; (3) it would become subject to heavy civil and criminal penalties and (4) it would suffer great and irreparable damages for specific reasons set out. (R. 15, 16, 23.) Respondent filed no answer denying any of these allegations. Petitioner alleged below that the said Section 21(d) did not apply to its suit because petitioner had no adequate remedy at law. It alleged further that, if said section be interpreted as prohibiting the injunction prayed for, the said

section, together with the other provisions of the Act, violated the Fifth Amendment to the Constitution in that said unconstitutional taxes would be collected from petitioner and petitioner would have no remedy by which it could recover said taxes, if they were unlawful, and thereby petitioner would be deprived of the right to test the constitutionality of the taxes. (R. 23.) Petitioner offered to give such security as the Court might require if the injunction were granted. (R. 24.) There was neither pleading nor proof that the granting of the injunction would in any wise injure respondent if the tax were ultimately held constitutional.

On October 29, 1935, petitioner was allowed an appeal. (R. 81.) On the same day petitioner applied for, and was denied, an injunction pending appeal. (R. 80.) The record was duly filed in the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, on November 4, 1935, being Cause No. 7951 on the docket of that Court. On November 4, 1935, petitioner applied to said Circuit Court of Appeals for an injunction against the respondent pending the hearing of its appeal (R. 87), but the Circuit Court of Appeals on November 5, 1935, denied the application. (R. 98.)

3.

Reasons Relied Upon for the Allowance of the Writ.

This case, with its companion cases, presents an entirely unprecedented situation. It presents questions of gravity and importance. It involves the

constitutionality of an important Federal statute and the rulings of the Court below, insofar as they may be taken to have held the statute constitutional, are probably in conflict with the decisions of this Court in *Loan Association v. Topeka* (1874), 20 Wall. 655; *Child Labor Tax Case* (1922), 259 U. S. 20; *Hill v. Wallace* (1922), 259 U. S. 44; *Hammer v. Dagenhart* (1918), 247 U. S. 251; and *Schechter Poultry Corporation v. United States* (1935), 295 U. S. 495; and contrary to the decision of the United States Circuit Court of Appeals for the Second Circuit in *Butler et al. v. United States* (1935), 78 Fed. (2nd) 1. The District Court and the Circuit Court of Appeals in holding that Congress may constitutionally forbid the granting of an injunction against summary collection of taxes, while at the same time depriving the taxpayer of any adequate remedy at law, presents a constitutional question of great importance never decided by this Court and a question which should be definitely decided. Though this question has never been *directly* decided by this Court, the decisions of the Courts below probably conflict with the decisions of this Honorable Court in *Truax v. Corrigan* (1921), 257 U. S. 312; *Brinkerhoff-Faris Trust & Savings Company v. Hill* (1930), 281 U. S. 673, and inferentially *Graham & Foster v. Goodcell* (1931), 282 U. S. 409, 430, 431; *Michaelson v. United States* (1924), 266 U. S. 42, 64, 65, 66, and *Phillips v. Commissioner* (1931), 283 U. S. 589, 596. This holding was particularly erroneous when the respondent was, at the same time,

authorized to collect the tax by summary proceedings under Sections 115 to 131, Title 26, U. S. C., as amended.

In holding that Article 3224, U. S. R. S., and Section 21(a) of said Act deprive the courts of jurisdiction to grant an injunction under the unusual and extraordinary circumstances of this case, the courts below decided an important question of Federal law in a way probably in conflict with the decisions of this Honorable Court in *Hill v. Wallace* (1922), 259 U. S. 44, and *Miller, Collector, v. Standard Nut Margarine Company* (1932), 284 U. S. 498, and in conflict with the unreported decisions of the Second, Sixth, Eighth, Ninth and Tenth Circuit Courts of Appeals, which granted injunctions pending appeal in cases similar to the present case.

The District Court, in refusing to grant petitioner's motion for a preliminary injunction, and in refusing to grant petitioner's motion for an injunction pending appeal, and the Circuit Court of Appeals in refusing to grant petitioner's motion for an injunction pending appeal, have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision and this action of the courts below is probably in conflict with the decision of this Honorable Court in *Ohio Oil Company v. Conway* (1929), 279 U. S. 813, and is in conflict with the holdings of every other Circuit Court of Appeals which has passed upon this question, to wit, the Circuit Courts of Appeals for the Second, Sixth, Eighth, Ninth and Tenth Circuits.

4.

Reasons Relied Upon for the Allowance of Writ Before Action on the Merits by the Circuit Court of Appeals.

This case, with its companion cases, presents a situation unparalleled in American history. Under the provisions of Sections 115 to 131, Title 26, U. S. C., as amended, the respondent is armed with weapons for the immediate forcible collection of the tax from petitioner, and those similarly situated, which they are powerless to resist. The District Court and Circuit Court of Appeals below have, contrary to the decisions of all other Circuit Courts of Appeals passing upon the question, held themselves deprived of any jurisdiction whatsoever to grant petitioner any relief. In the ordinary course of events it will be six or seven months before petitioner's appeal to the Circuit Court of Appeals will be heard on the merits. Meanwhile, through collection of the tax the subject-matter of the appeal may be destroyed, and the case become moot before a hearing may be had in the Circuit Court of Appeals. In addition, the order of the court below, though apparently an interlocutory order, has the effect of finally disposing of the appeal on the merits. The questions involved are of great national importance, and deserve the prompt consideration of this Honorable Court. This petition raises important questions of constitutional law not raised by any other petition now before this Court, and particularly it raises the question whether the provisions of Sections 115 to 131, Title 26, U. S. C., as

amended, are constitutional, if it be held that Congress may constitutionally deprive a taxpayer of all adequate remedy at law to recover taxes illegally collected while at the same time forbidding the granting of an injunction to restrain their collection. Hundreds of similar suits throughout the country involve this question, as well as the others herein raised, and the situation thus presented is so unusual and unprecedented as to justify this Honorable Court in requiring the record below to be certified to it forthwith for decision.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding said court to certify and send to this Court, on a day certain, to be therein designated, a full and complete Transcript of the Record and all of the proceedings in the Circuit Court of Appeals in said cause entitled Noble-Trotter Rice Milling Co., Inc., Appellant; v. Rufus W. Fontenot, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana, Appellee, No. 7951 on its docket, to the end that said cause may be reviewed and determined by this Court as provided by Section 240 of the Judicial Code, as amended, and that your petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provisions of the Judicial Code, and that said judgment of the

District Court be reversed by this Honorable Court and such relief granted as is appropriate to the cause.

NOBLE-TROTTER RICE MILLING CO., INC.,

By C. A. McCOY,
Attorney for Petitioner.

Of Counsel,
McCOY, KING & JONES,
Lake Charles, La.

No.....

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RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The Opinions of the Courts Below.

The District Court wrote no opinion and the Circuit Court of Appeals has not yet rendered any decision on the merits of the appeal. The *per curiam* opinion of the Court denying the injunction pending appeal is found on page 98 of the record.

II.

Jurisdiction.

(1) Jurisdiction of this cause is conferred upon this Honorable Court by *Judicial Code, Section* 240, *as amended; United States Code, Title* 28, *Section* 347.

(2) The date of the judgment of the Trial Court to be reviewed is October 28, 1935 (R. 79), the date of the order of the Circuit Court of Appeals denying the injunction pending appeal sought to be reviewed is November 5, 1935. (R. 98.)

(3) The power of this Honorable Court to review the case prior to a disposition of it by the Circuit Court of Appeals and to review the action of the Circuit Court of Appeals in refusing to grant an interlocutory order to preserve the *status quo* is sustained by the following, among other, cases:

The Three Friends (1897), 166 U. S. 1, 49.
Denver v. New York Trust Company (1913), 229 U. S. 123, 133.
Harriman v. Northern Securities Company (1905), 197 U. S. 244, 286.
American Construction Company v. Jacksonville Railway (1893), 148 U. S. 372, 384.
Forsyth v. Hammon (1897), 166 U. S. 506, 513.
In re Chetwood (1897), 165 U. S. 443, 462.
McClellan v. Carland (1910), 217 U. S. 268, 277.
Hanover Star Milling Company v. Metcalf (1916), 240 U. S. 403, 408.
Gay v. Ruff (1934), 292 U. S. 25, 30.

III.

Statement of the Case.

A full statement of the case has been given under heading 2 in the petition and in the interest of brevity the statement is not repeated at this point.

IV.

Specification of Errors.

(1) The District Court erred in holding that it was without jurisdiction to hear petitioner's cause because of the provisions of R. S. Sec. 3224, and Sec. 21(a) of the Agricultural Adjustment Act, as amended.

(2) The District Court erred in refusing to grant petitioner a preliminary injunction pending a hearing on the merits.

(3) The District Court and Circuit Court of Appeals erred in holding that said Sec. 21(a) did not deprive petitioner of its property without due process of law contrary to the Fifth Amendment to the Constitution of the United States, in view of the allegations in the bill, admitted by the motion to dismiss, that petitioner was without remedy at law to recover the taxes paid if they were held to be illegal.

(4) The District Court and the Circuit Court of Appeals erred in holding that if said Sec. 21(a) forbade the granting of an injunction restraining the collection of the tax, and if petitioner had no remedy at law to recover the same, if it be held they were illegally collected, respondent could neverthe-

less employ the summary proceedings for immediate collection of the tax provided in Sections 115 to 131, Title 26, U. S. C., as amended, without depriving petitioner of its property without due process of law contrary to the Fifth Amendment to the Constitution of the United States.

(5) The District Court and the Circuit Court erred in holding that either or both R. S. §3224, and Sec. 21(a) of said Act prevented the granting of an injunction under the special and extraordinary circumstances presented by this case.

(6) The Circuit Court of Appeals erred in holding that petitioner had "a remedy at law to recover back any taxes illegally exacted."

(7) The Circuit Court of Appeals erred in refusing to grant petitioner an injunction to preserve the *status quo* pending its appeal from the order dismissing the bill.

(8) The Circuit Court of Appeals erred in refusing to grant petitioner an injunction pending the appeal for the purpose of preserving the appellate jurisdiction of that Court.

(9) The Circuit Court of Appeals erred in holding either or both R. S. §3224, and Sec. 21(a) of said Act "deprived the Court of jurisdiction to grant injunctive relief."

(10) The District Court and Circuit Court of Appeals erred in not holding the Agricultural Adjustment Act, as amended, to be violative of Art. 1, Sec. 1, Amendments Five and Ten of the Constitution of the United States.

Petitioner expects to rely on all of the foregoing specifications of error.

V.

ARGUMENT

Summary of the Argument.

Point A

Neither R. S. §3224, nor Sec. 21(a) of the Agricultural Adjustment Act, properly interpreted, bars injunctive relief in this case.

Point B

Sec. 21(d) of the Agricultural Adjustment Act deprives petitioner of any adequate remedy at law.

Point C

If R. S. §3224, and Sec. 21(a) of the Agricultural Adjustment Act forbid the granting of an injunction in this case, then they are unconstitutional.

Point D

The summary proceedings provided in Sections 115 to 131, Title 26, U. S. C., as amended, are unconstitutional when applied to a taxpayer who has been deprived of both legal and equitable remedies to test the constitutionality of the tax thus sought to be collected.

Point E

The Agricultural Adjustment Act, as amended, is unconstitutional.

Point F

This is a case where certiorari should be granted prior to the final decree by the Circuit Court of Appeals.

Point A

Inapplicability of R. S. §3224 and Section 21(a) of the Agricultural Adjustment Act.

In wording and in effect R. S. §3224 and Sec. 21(a) of the Agricultural Adjustment Act, as amended, are for all practical purposes identical. For the convenience of the Court the two acts are here set out side by side:

R. S. §3224.	**A. A. A. Sec. 21(a).**
No suit	No suit, action or proceeding (including probate, administration, receivership, and bankruptcy proceedings)
shall be maintained in any court	shall be brought or maintained in any court
for the purpose of restraining the assessment or collection of any tax.	if such suit, action or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or

> collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment * * *.

This Court has consistently held that despite the apparently unconditional terms of R. S. §3224, injunctions against the collection of a tax may issue in proper cases. The latest expression of the Court on the point is found in *Miller v. Standard Nut Margarine Company* (1932), 284 U. S. 498, 509, where the Court said:

> "The section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well established rule. * * * It has never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable. * * *
>
> " * * * * It requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that, by reason of the special and extraordinary facts and circumstances, Sec. 3224 does not apply."

See also Hill v. Wallace (1922), 259 U. S. 44, 62; Dodge v. Osborn, (1916), 240 U. S. 118, 121.

Section 21(a) was included in the amendment to the Act of August 24, 1935, after numerous suits to restrain the collection of the tax had been filed throughout the country in which the contention was made that the supposed tax was in fact no tax at all but a penalty. *e.g., Penn v. Glenn,* 10 Fed. Supp. 483, 484 (April 13, 1935); F. G. Vogt & Sons, Inc. v. Rothensies, 11 Fed. Supp. 225, 230 (July 17, 1935); Armour & Company v. Harrison (not yet reported, District Court, Northern District of Illinois), in which the Court said in connection with R. S. §3224:

> "Merely to call this exaction a tax does not make it a tax. It is not levied for governmental purposes; therefore, it is not a tax. Therefore, the statute has no application to it."

The obvious purpose of Congress in including this section in the amendment was to make certain its intention that the principle of R. S. §3224 should apply to suits brought to restrain collection of these particular taxes. Having expressed its intention in words practically identical with those used in R. S. §3224, the amendment must be interpreted in the light of the well settled rule that, when a statute is reenacted in the same words as a previous statute which has received a judicial interpretation, the re-enacted statute includes the previous judicial interpretation. Louisville Cement Co. v. Interstate Commerce Commission (1918), 246 U. S. 638, 644.

Further it must be interpreted in the light of the

rule that a statute, susceptible of two constructions, should be construed in such a way as not to raise doubts as to its constitutionality. *Panama R. R. Co. v. Johnson* (1924), 264 U. S. 375; *Michaelson v. United States* (1924), 266 U. S. 42. As will be pointed out hereafter, to interpret this statute in the manner in which it has been interpreted below would raise grave doubts as to its constitutionality.

Interpreting these statutes as not forbidding injunctive relief in *all* cases we may pass to a discussion of whether extraordinary and exceptional circumstances exist in this case such as would render them inapplicable.

Point B

Section 21(d) of the Agricutural Adjustment Act Deprives Petitioner of Its Remedy at Law.

Section 21(d)* forbids the return of any taxes illegally collected under the Act unless the taxpayer proves, to the satisfaction of the Commissioner, that neither the taxpayer nor any person directly or indirectly under his control has, directly or indirectly, included the amount of the tax or any part thereof in the price of the commodity with respect to which it was imposed, or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner or included any part of such amount in the charge or fee

*Printed in the appendix.

for processing, and that the price paid by the taxpayer for the commodity was not reduced by any part of the tax paid. This, obviously, was an attempt to enact into law the economic theory that the burden of any tax imposed upon a manufacturer or processor is ultimately passed on to others. In speaking of a sales tax, Mr. Justice Stone and Mr. Justice Brandeis, dissenting in *Indian Motorcycle Company v. U. S.* (1931), 283 U. S. 570, 581, said:

> "In the Panhandle Oil Case, it was held that this shifting of the burden of a State tax from the seller to the buyer was sufficient to render the tax invalid where the buyer was an agency of the United States, and it was assumed that the burden of the sales tax involved was so inevitably passed on to the buyer as to require this result. With this assumption economists would not, I believe, generally agree. Many hold that whether the burden of any tax paid by the seller is actually passed on to the buyer depends upon considerations so various and complex as to preclude the assumption *a priori* that any particular tax at any particular time is passed on. In some conditions of the market, the burden remains with the seller, or even may be shifted back from the seller to the producer by the reduction of the producer's price, rather than forward to the consumer by an increase of the seller's price."

Likewise Mr. Justice Holmes speaking for the full Court in *Lash's Products Company v. U. S.* (1929), 278 U. S. 175, 176, said:

> "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the

> manufacturer and on him alone. Heckman & Co. v. I. S. Dawes & Son Co., 12 F. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all."

A sales tax is of course easily identifiable, or capable of identification, because levied on the sale of a given identifiable object and based upon the price at which the object is sold. If the question of whether such a tax has been "passed on" is so debatable, how much more so must be the case of a tax, such as a processing tax, which is carried as a part of the processor's expenses of operation? Even more complicated is the situation when, as here, the price paid to the producer and by the consumer fluctuates from day to day on competitive markets influenced by complex and manifold economic factors. However, whatever the merits of the theory *qua* theory, there can be no question that in order to make *factual proof* as to whether a processing tax has been "passed on" it must be shown that the price to the vendee has been increased *because* of the tax, or that the price paid to the producer has been reduced *because* of the tax. When a commodity, such as rice, is bought and sold on competitive markets such proof can be made only by proving what the market *would have been* had there been no tax. This Court held in *International Harvester Company v. Kentucky* (1914), 234 U. S. 216, 223, that the determination of what the market price of a given article would have been under different cir-

cumstances "is a problem that no human ingenuity could solve," and that:

> "The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. * * *
>
> " * * * To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess."

The situation involved in this case is many times more complex than that in the case just referred to. The manner in which the rice milling business is conducted is too complicated to set out in the confines of this brief but is fully set out in the petition and affidavits in support thereof. (R. 16-21, 60-75.) Because of the manner in which the rice milling business is, and must be, conducted it is impossible for a miller to tell accurately whether he has made a profit or loss with respect to the purchase, milling, and sale of a given lot of rough rice. (R. 62.) He can make a book figure with regard to any such lot.

of rice by the use of averages, estimates, and arbitraries but that is all. He can only tell, at the end of the season, whether he has made a gain or loss on the season's operations. (R. 62.) The processing tax is levied upon each lot of rice based upon its weight at the time it reaches the mill and in order to recover the tax paid on such rice, under the provisions of Sec. 21(d), the miller must prove that he did not "pass on" the tax with respect to that particular lot of rice. Since he cannot even determine whether he made a profit or a loss on the particular transaction, it is manifestly impossible for him to know, much less prove, whether he has passed the tax on. However, even if he were able to prove exactly the amount of profit he made on each transaction, he would still have proved nothing but that. For all that he, or anyone else, could know he might have been able to sell the particular lot of rice for exactly the same price even if there had been no tax and he might have been able to purchase it for exactly the same price had there been no tax. On the face of it such matters are incapable of proof or even a sound guess. The miller cannot control the market on which he buys nor that on which he sells but he is compelled to buy and sell on those markets if he is to stay in the rice milling business. This lack of control of the markets by the miller is illustrated by the fact that the present cost of rough rice, plus operatings costs, including tax, is more than the miller can reasonably expect to get out of the products processed from it on the present market

for clean rice and rice products. (R. 62.) Manifestly under such circumstances no one can know, much less prove, whether the ultimate burden of the tax has fallen on the producer, the miller, or the purchaser. An analogous situation arises where a trademark has been infringed and the question arises as to how much of the sales price received by the infringer is attributable to the use of the trademark and how much to the intrinsic value of the object sold. In *Hamilton Shoe Company v. Wolf Bros.* (1916), 240 U. S. 251, 260, this Court held that in such a case it would, in the very nature of things, be impossible to ascertain to what extent the infringer could have effected sales and at what prices except for the use of the trademark. The same principle is applicable here—it is inherently impossible, in the circumstances of this case, for petitioner, or any other rice miller, to ascertain or prove to what extent he could have "effected sales and at what prices" except for the existence of the processing tax.

More than a thousand suits to enjoin the collection of these taxes have been filed throughout the United States. Insofar as petitioner knows the government has never yet been able to suggest *how* the proof required by the statute can be made. The government has satisfied itself with the simple assertion that proof *can* be made and with citing the opinion of this Court in *United States v. Jefferson Electric Manufacturing Company* (1934), 291 U. S. 386, 402, where the Court said:

"If the taxpayer has borne the burden of the tax, he can readily show it." * * *

The tax involved in that case was a tax upon the *sale* of a definite determinable object and amounted to 5% of the price for which the object was sold. The tax was not upon the manufacture, or the manufacture *and* sale. *Indian Motor Cycle Company v. United States* (1931), 283 U. S. 570, 574. In determining whether the payer of the tax collected it from the vendee or paid it himself there were no such complications as here exist. Indeed it was not suggested by anyone that the required proof could not be made; only that the taxpayer should not have to make it because the tax involved in the suit had been paid prior to the passage of the Act and at a time when it would not have been necessary for the payer to make such proof to procure refund. (P. 401.) The present case came before the Circuit Court of Appeals on a *final judgment dismissing the bill* on motion of the respondent which admitted the allegation that the proof required by the Act was impossible of being made. Nevertheless, and in the face of this, the Circuit Court of Appeals held that petitioner had "a" remedy at law (nothing being said as to the *adequacy* of it). Petitioner asserts that on the face of the Act, considering the *kind* of tax involved, an impossible burden of proof is placed upon petitioner. Petitioner further asserts that even if this were not true the Courts below should have enjoined the collection of the tax until such time as the courts could make a finding upon the

fact question of whether, under the peculiar conditions of the rice milling industry, the proof could be made. Respondent has not denied the allegations of petitioner's bill in this respect and under the circumstances the Court should not have dismissed the bill but was under the plain duty of preserving the *status quo* until such time as the facts upon which petitioner's constitutional rights depended could be fully determined. *cf Ohio Oil Company v. Conway* (1929), 279 U. S. 813.

Besides the lack of any adequate remedy at law this case presents several other grounds for equitable relief which have been held sufficient by this Court for the enjoining of the collection of a tax:

1. Multiplicity of suits (R. 23). *Wilson v. Illinois Southern Railroad* (1924), 263 U. S. 574; *Raymond v. Chicago Union Traction Company* (1907), 207 U. S. 20.

2. Congress has made no appropriation to repay any of these taxes if illegally collected, even if an adequate remedy at law were available, and in view of the tremendous amount involved it is improbable that any such appropriation will be made. (R. 24.) *Stewart Dry Goods Company v. Lewis* (1932), 287 U. S. 9.

3. The statute purporting to give the legal remedy has never been interpreted by the Courts and for this reason, if no other, petitioner's remedy at law cannot be said to be adequate. *Atlantic Coast Line v. Daughton* (1923), 262 U. S. 413. *cf Union Pacific Railroad v. Weld County* (1917), 247 U. S. 282.

4. The existence of the heavy civil and criminal penalties provided by Section 19(b) of the

Act*. (R. 15.) *Ex Parte Young* (1908), 209 U. S. 123, 146; *Wallace v. Hines* (1920), 253 U. S. 66.

Point C

Unconstitutionality of R. S. §3224 and Sec. 21(a) of the Agricultural Adjustment Act Under the Circumstances of This Case.

The argument is made that the District Courts and Circuit Courts of Appeals, not being constitutional courts, may be completely abolished by Congress and therefore Congress may place any desired restriction on their jurisdiction. The answer to this is that Congress has not abolished the District Courts nor the Circuit Courts of Appeals and not having abolished them the Congress may not constitutionally deprive one class of citizens of the right to equitable relief therein while at the same time and under similar circumstances other taxpayers are permitted to obtain such relief. Persons other than those subject to the processing tax from whom illegal taxes are sought to be collected may enjoin their collection under special and extraordinary circumstances. *Hill v. Wallace, supra; Miller v. Standard Nut Margarine Company, supra.* The right to protect one's property by invoking the aid of courts is as much a property right as the property itself, and to deny one class of citizens this right while granting it to others under similar circumstances

*The applicable penalty provisions are copied in Appendix C hereto.

is to deprive the class so denied of its property without due process of law. In *Truax v. Corrigan* (1921), 257 U. S. 312, which involved an Arizona statute which forbade the issuance of injunctions to protect property rights in cases of labor disputes the contention was made in support of the validity of the statute that the State could have completely abolished the lower courts and therefore the State could put such limitations as it desired upon their jurisdiction. This court nevertheless held the statute violative of the Fourteenth Amendment. Since the validity of exertions by the Federal Government of any of its delegated powers under the Fifth Amendment are to be measured by the same standards by which exertions of State power are measured under the Fourteenth Amendment, *Hamilton v. Kentucky Distilleries Co.* (1919), 251 U. S. 146, 156, it would seem clear that R. S. §3224 and Sec. 21(a) of the Agricultural Adjustment Act are unconstitutional if they be construed as depriving courts of jurisdiction to issue injunctions to protect property rights in tax cases where the taxpayer is without remedy, or at least adequate remedy, at law.

In *Brinkerhoff-Faris Trust & Savings Company v. Hill* (1930), 281 U. S. 673, the Supreme Court of Missouri held that the trial court properly dismissed a bill seeking to enjoin the illegal assessment and collection of taxes on the ground that the taxpayer should first have pursued remedies before the State Board of Equalization. That court had

previously held that the State Board of Equalization was without jurisdiction to hear such complaints. The effect of the second decision was to deprive the petitioner of all right to test the validity of the tax. This court held that this amounted to a deprivation of petitioner's property without due process of law, Mr. Justice Brandeis saying:

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

This language is exactly applicable to the instant case and seems conclusive that if R. S. §3224 and Sec. 21(a) of the Agricultural Adjustment Act be construed as forbidding injunctive relief in this case they are unconstitutional. See also *Graham & Foster v. Goodcell* (1931), 282 U. S. 409, 430, 431.

However absolute the power of Congress to destroy the jurisdiction of the inferior Federal Courts may seem, it is no more absolute than the apparent power of the State to arbitrarily exclude a foreign corporation from doing business within its borders. Nevertheless, this court has held, *Fidelity & Deposit Company v. Tafoya* (1926), 270 U. S. 426, that this "most absolute seeming" right was qualified and in some circumstances could become wrong, and that despite this apparently unqualified right the State could not impose an unconstitutional condition upon the foreign corporation coming into the

State. The exercise of Congress's right to limit the equity jurisdiction of the lower Federal Courts in the granting of injunctions in tax cases such as the present would be, as in the case just cited, for the purpose of securing a result forbidden by the Fifth Amendment, i. e., the deprivation of petitioner's property without due process of law, and may not stand.

There is still another reason why these statutes, if construed to absolutely and in all cases forbid injunctions, are unconstitutional. The Constitution, Article III, Section 1, vests the judicial power of the United States in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish. By Section 2 of Article III this judicial power extends to all cases in law and *equity* arising under the Constitution and laws of of the United States. Congress having established the District Courts and the Circuit Courts of Appeals, they, by virtue of the Constitution, at once become vested with judicial power in all cases arising under the Constitution and laws of the United States. These inferior courts derive their *judicial power* from the Constitution and not from any act of Congress. Congress may well have the power to regulate the procedure in these courts and to define their jurisdiction but Congress may not, it is submitted, deprive the courts of their *inherent judicial powers* which naturally follow from the Constitutional grant of those powers. This was expressly held in *Michaelson v. United States*

(1924), 266 U. S. 42, 64, 65, 66, where the court said:

> *"If the statute now under review encroaches upon the equity jurisdiction intended by the Constitution, a grave constitutional question in respect of its validity would be presented;* and it, therefore, becomes our duty, as this Court has frequently said, to construe it 'if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.' Panama R. R. Co. v. Johnson, 264 U. S. 375.
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> * * *
>
> "But it is contended that the statute materially interferes with the inherent power of the courts and is therefore invalid. That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. *The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power.* So far as the inferior Federal Courts are concerned, however, it is not beyond the authority of Congress (*Ex parte* Robinson, 19 Wall. 505, 510-511; Bessette v. W. B. Conkey Co., 194 U. S. 324, 326); *but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative.* That it may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character."

The power of courts of equity to issue injunctions to protect property rights, which could not otherwise be protected, is quite as inherent as the power

to punish for contempt. Conceding the authority of Congress to regulate or limit the use of the power, to an undefined extent, the case here presents no such situation, for to interpret the acts as depriving the courts of the power to issue injunctions in *every case* involving the collection of the tax, would be to completely destroy one of the inherent powers of the court which it possesses by virtue of Section 2 of Article III of the Constitution. For these reasons petitioner submits that R. S. §3224 and Sec. 21(a) of the Agricultural Adjustment Act, so construed, are unconstitutional.

Point D

Unconstitutionality of Summary Proceedings for Collection of the Tax.

Under Sections 115 to 131, Title 26, U. S. C., as amended,* which are incorporated into the present Act, the Commissioner is authorized to collect the taxes, upon non-payment, by the fixing of liens on all of petitioner's property or by the levying of distraints against petitioner's property, including bank accounts, etc. The procedure is summary and under the distraint proceedings it would be entirely possible for the Commissioner to collect the full tax alleged to be owed by petitioner before petitioner could even know any proceedings had been started to collect the tax. All that would be necessary would be for the Commissioner or a deputy to walk

*Printed in Appendix B.

to petitioner's bank with the proper papers and distrain petitioner's money there deposited. The constitutionality of this summary procedure was upheld in *Phillips v. Commissioner* (1931), 283 U. S. 589, 596, upon the express ground that under existing statutes the taxpayer was given ample opportunity to ultimately test the liability for the tax in a court of law, the court saying:

> "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, *if the opportunity given for the ultimate judicial determination of the liability is adequate.* Springer v. United States, 102 U. S. 586, 593; Scottish Union & National Ins. Co. v. Bowland, 196 U. S. 611, 631."

Under the facts of this case plaintiff is deprived of all legal remedy to recover the tax collected, if it be held illegal, because of the impossible burden of proof petitioner would have to meet in such a suit and, if R. S. §3224 and Sec. 21(a) be so construed, petitioner is deprived of the right to test the validity of the tax by a suit for an injunction. To permit the government to summarily seize petitioner's property under these circumstances would be to deprive petitioner of his property without due process of law and to argue this further would be to argue the obvious. See, in addition to the case cited, *Lipke v. Lederer* (1922), 259 U. S. 557, 562; *Carpenter v. Shaw* (1930), 280 U. S. 363, 369; *Ward v. Love County* (1920), 253 U. S. 17.

Point E

The Agricultural Adjustment Act, as Amended, Is Unconstitutional.

Petitioner asserts that the Agricultural Adjustment Act, as amended, is unconstitutional for the following reasons:

1. The Act, though in form a revenue measure, is in fact an attempt to regulate the price at which petitioner buys and sells rice in intrastate commerce.

2. The Act is an attempt to control the production of agricultural commodities within the several States.

3. The taxes are not levied for the general welfare or for a public purpose.

4. The Act, as amended, contains an unconstitutional delegation of legislative power to the Secretary of Agriculture.

Section 2(1) of the Act declares the policy of the Act to be "to establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. * * *" The rice miller is still compelled to pay the market price for all rice bought from farmers, and in addition thereto he is compelled to pay $1.62 per barrel

on the rice so purchased, which $1.62 in turn is given to the farmer under the guise of benefit payments. The object is to raise the price to the farmer and that object is obtained in part, at least, by compelling petitioner to pay at least $1.62 per barrel more for his rice than he would otherwise have to pay. Since the purchase is wholly within intrastate commerce, it is unquestionably beyond the power of the Federal Government to control. *Hill v. Wallace* (1922), 259 U. S. 44; *Schechter Poultry Corporation v. United States* (1935), 295 U. S. 495; *Butler v. United States of America* (C. C. A., First, 1935), 78 Fed. (2nd) 1. Congress being without power by direct regulation to fix or control these prices, it cannot achieve the same result by casting a law having that purpose into the form of a revenue measure. *Child Labor Tax Case* (1922), 259 U. S. 20; *Hill v. Wallace, supra; Hammer v. Dagenhart* (1918), 247 U. S. 251.

Secondly, the Act attempts to control and reduce the production of agricultural commodities by farmers within the several States. In Section 8(1) the Secretary of Agriculture is authorized

> "to provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, such amounts as the Secretary deems fair and reasonable." * * *

Of all industries, agriculture is the most essentially intrastate, and this has long been recognized by this Court. *Kidd v. Pearson* (1888), 128 U. S. 1, 21; *Heisler v. Thomas Colliery Company* (1922), 260 U. S. 245, 259; *Industrial Association v. United States* (1925), 268 U. S. 64, 82. Since the Act has for its purpose the regulation of this purely intrastate matter, *Schecter Poultry Corporation v. U. S., supra; Hill v. Wallace, supra,* the tax levied to effectuate this purpose must fall. *Child Labor Tax Case, supra; Railroad Retirement Board v. Alton Railroad Company* (1935), 295 U. S. 330; *Gibbons v. Ogden* (1824), 9 Wheat. 1, 199.

The fact that the arrangements between the Secretary of Agriculture and the individual farmers by which the latter reduce their acreage and the former makes benefit payments to them therefor out of the taxes collected from processors does not make the Act in purpose and effect any the less a regulation of agriculture within the State. *cf. Schecter Poultry Corporation v. U. S., supra,* p. 529. The arrangements are made by virtue of, and under authority of, the law, and it is idle to say that the act of the farmer in reducing his acreage pursuant to the contract with the Secretary of Agriculture is voluntary when the farmer knows that if he does not execute such agreement he is subjected to the penalty of having to sell his commodity at the same price at which other farmers sell it minus the substantial amount received by the other farmers by way of benefit payments. (R. 41.) Further-

more, without the tax provisions in the Act (which are certainly not voluntary) the enormous benefit funds with which to coerce the farmers into making the "voluntary" agreements would not be available and the result sought to be achieved by Congress, to wit, the regulation of agriculture within the several States, could not be accomplished.

Third, it seems plain that these taxes are not levied for the general welfare or a public purpose, as required by Article I, Section 8, Clause 1, of the Constitution. It is plain from the face of the Act that it is an attempt to redistribute purchasing power and the taxes provided by the Act are to be used solely for that purpose. Under Section 12(b) of the Act it is provided that "* * * for the purpose of effectuating the declared policy of this title, a sum equal to the proceeds derived from *all taxes* imposed under this title is hereby appropriated to be available to the Secretary of Agriculture * * *." That a tax cannot be levied on A for the purpose of paying a bounty to B was long ago held by this court in *Loan Association v. Topeka* (1874), 87 Wall. 655, 663, where Mr. Justice Miller said:

> "The power to tax is, therefore, the strongest, the most pervading of all the powers of the government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of McCullough v. The State of Maryland, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent imposed by the United States on the circula-

> tion of all other banks than the National banks, drove out of existence every State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised."

It has been urged that the tax is constitutional because a favorable readjustment of the farmers' economic condition will ultimately redound to the general public good. The same sort of an argument was made to the court in *Loan Association v. Topeka, supra,* but the court rejected it, saying at page 665:

> "If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions."

While many assert that our economic difficulties are attributable to the condition of the farmer, there are still others who attribute it to the condition of the manufacturers or the condition of our export trade. If a tax can be levied to pay a bounty to farmers no reason is perceived why a tax may not be constitutionally levied to pay bounties to manu-

facturers or to those engaged in export trade or those engaged in any of our basic industries.

Finally, the processing tax provisions (Sec. 9),* even as altered by the amendment of August 24, 1935, violate Article I, Section 1, of the Constitution in making an unlawful delegation of legislative power to the Secretary of Agriculture. While the amendment provides for an initial processing tax on rice of 1c per pound (or $1.62 per barrel), nevertheless, under Sec. 9 the Secretary is given full power at any time to reduce, increase, modify or eliminate the tax, not by any practical standard, but largely by his opinion or prophecy of future prices and conditions. Where all such questions as to the duration of the tax and its increase or decrease or elimination are thus left to be resolved by the Secretary of Agriculture alone, it is clear that the Act still runs counter to Article I, Section 1, and is therefore unconstitutional. *Schechter Poultry Corporation, supra; Panama Refining Co. v. Ryan* (1934), 293 U. S. 388.

Point F

Certiorari Should Be Granted at the Present Time.

The opinion and order of the Circuit Court of Appeals, while interlocutory in form, in truth and in fact finally disposed of the case upon the merits. When it held that petitioner had a remedy at law and that the Courts below were without jurisdiction to grant the injunction prayed for (R. 98) the result

*Set out in Appendix D.

was a denial of all the relief sought by petitioner. Since the case will not come up for a hearing on its merits in the ordinary course of events until after the lapse of six or seven months the subject of the suit will be destroyed, the case become moot, and petitioner deprived of all right to have its case heard on the merits by any court unless this Court grants certiorari. If the order of the Circuit Court of Appeals is allowed to stand all the trial courts in the Circuit will feel bound thereby and will of necessity dismiss all bills filed in the Circuit for the purpose of testing the constitutionality of the taxes levied by the Agricultural Adjustment Act, as amended, with the result that not only your petitioner, but all other citizens living within the States of Texas, Louisiana, Mississippi, Alabama, Georgia and Florida be effectively deprived of any opportunity of testing the validity of this statute. There can be no question but that the constitutional questions raised in this case are grave and of national importance and this case involves an unprecedented situation. That the action of the Circuit Court of Appeals in denying the motion for an injunction to preserve the *status quo* pending appeal was wrong is plainly indicated by the fact that its action is contrary to the action of the Circuit Courts of Appeals for the Second, Sixth, Eighth, Ninth and Tenth Circuits, in granting injunctions in similar cases. It stands alone, unsupported by the decision of any other circuit. Its error can be corrected only by this Court now granting certiorari since there is

now before this Honorable Court a cause involving the constitutionality of the Agricultural Adjustment Act, which said cause is set for oral argument on December 9, 1935, and which will in the ordinary course of events be decided long prior to the time when this case would come up for hearing in the Circuit Court of Appeals. Without a writ of certiorari from this Honorable Court petitioner will have been compelled meanwhile to pay the taxes and if the Act be held unconstitutional its case would become moot and the taxes paid by it probably forever lost.

While the power to bring up a case pending in the Circuit Court of Appeals prior to final action in that Court is one to be sparingly exercised, the power nevertheless exists. *American Construction Company v. Jacksonville Railway* (1893), 148 U. S. 372. This Court said in *In Re Chetwood* (1897), 165 U. S. 443, 462:

> "And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the Act of March 3, 1891, C. 517, 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction *and in furtherance of justice.*"

Likewise in *Harriman v. Northern Securities Company* (1905), 197 U. S. 244, 286, where the decree of the Circuit Court of Appeals actually dis-

posed of the entire case, although interlocutory in form, this Court granted certiorari. Other cases in which this Court has granted certiorari prior to a final decree in the Circuit Court of Appeals are *Denver v. New York Trust Company* (1913), 229 U. S. 123, 133; *Spiller v. Atchison, T. & S. F. Railway Company* (1920), 253 U. S. 117, 120; and *Dupont Powder Company v. Mastland* (1917), 244 U. S. 100. And in *The Three Friends* (1897), 166 U. S. 1, 49, this Court reviewed a decision of the District Court prior to action by the Circuit Court of Appeals on the appeal pending therein.

CONCLUSION

It is therefore respectfully submitted that this case is such as to call for the exercise by this Court of its supervisory powers. If the decisions of the District Court and the Circuit Court of Appeals stand, the result will be that petitioner will be deprived of its property without due process of law, and will be so deprived without any opportunity to test in the Courts the constitutional rights asserted in its bill of complaint. Unless this Honorable Court exercises such supervisory powers prior to the entry of a final decree in the Circuit Court of Appeals the subject matter of the suit will be destroyed, the suit become moot, and petitioner forever deprived of its constitutional rights. This Court should, therefore, review forthwith the decision of

the United States Circuit Court of Appeals for the Fifth Circuit and the decision of the District Court of the United States for the Eastern District of Louisiana.

Respectfully submitted,

By C. A. McCoy,
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McCoy, King & Jones,
Of Counsel.

APPENDIX A

R. S. ART. 3224

No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * *

SECTION 21 OF AGRICULTURAL ADJUSTMENT ACT

SEC. 21 (*a*) No suit, action, or proceedings (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment, or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (*d*) of this section, may be reserved in the court's order.

(*b*) The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regu-

lations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes (together with penalties and interest with respect thereto) prior to said date are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to Section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment.

(*c*) The making of rental and benefit payments under this title, prior to the date of the adoption of this amendment, as determined, prescribed, proclaimed and made effective by the proclamations of the Secretary of Agriculture or of the President or by regulations of the Secretary, and the initiation, if formally approved by the Secretary of Agriculture prior to such date of adjustment programs under Section 8 (1) of this title, and the making of agreements with producers prior to such date, and the adoption of other voluntary methods prior to such date, by the Secretary of Agriculture under this title, and rental and benefit payments made pursuant thereto, are hereby legalized and ratified, and the making of all such agreements and payments, the initiation of such programs, and the adoption of all such methods prior to such date are hereby legalized, ratified, and confirmed as fully to all intents and purposes as if each such agreement, program, method, and payment had been specifically author-

ized and made effective and the rate and amount thereof fixed specifically by prior Act of Congress.

(*d*) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considerd by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (*a*) or (*c*) of Section 15, Section 16, or Section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of Section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by rea-

son of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (*a*) and (*b*) of Section 16, had the tax terminated by proclamation pursuant to the provisions of Section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held

invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies, regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, or jurisdiction of such courts based upon the amount in controversy.

(*e*) In connection with the establishment, by any claimant, of the facts required to be established in subsection (*d*) of this section, the Commissioner of Internal Revenue is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda, relative to any matter affecting the findings to be made by the Commissioner pursuant to subsection (*d*) of this section, to require the attendance of the claimant or of any officer or employee of the claimant, or the attendance of any other person having knowledge in the premises, and to take, or cause to be taken, his testimony with reference to any such matter, with power to administer oaths to such person or persons. It shall be lawful for the Commissioner, or any collector designated

by him, to summon witnesses on behalf of the United States or of any claimant to appear before the Commissioner, or before any person designated by him, at a time and place named in the summons, and to produce such books, papers, correspondence, memoranda, or other records as the Commissioner may deem relevant or material, and to give testimony or answer interrogatories, under oath, relating to any matter affecting the findings to be made by the Commissioner pursuant to subsection (*d*) of this section. The provisions of Revised Statutes 3174 and of Revised Statutes 3175 shall be applicable with respect to any summons issued pursuant to the provisions of this subsection. Any witness summoned under this subsection shall be paid, by the party on whose behalf such witness was summoned, the same fees and mileage as are paid witnesses in the courts of the United States. All information obtained by the Commissioner pursuant to this subsection shall be available to the Secretary of Agriculture upon written request therefor. Such information shall be kept confidential by all officers and employees of the Department of Agriculture, and any such officer or employee who violates this requirement shall, upon conviction, be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or both, and shall be removed from office.

(*f*) No refund, credit, or abatement shall be made or allowed of the amount of any tax, under Section 15, or Section 17, unless, within one year after the right to such refund, credit, or abatement has accrued, a claim for such refund, credit, or abatement (conforming to such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled to such refund, credit, or abatement, except that if the right to any such refund, credit, or abatement accrued prior to the date of the adoption of this amendment, then

such one-year period shall be computed from the date of this amendment. No interest shall be allowed or paid, or included in any judgment, with respect to any such claim for refund or credit.

(*g*) The provisions of Section 3226, Revised Statutes, as amended, are hereby extended to apply to any suit for the recovery of any amount of any tax, penalty, or interest, which accrued, before, on, or after the date of the adoption of this amendment under this title (whether an overpayment or otherwise), and to any suit for the recovery of any amount of tax which results from an error in the computation of the tax or from duplicate payments of any tax, or any refund or credit authorized by subsection (*a*) or (*c*) of Section 15, Section 16, or Section 17 of this title or any refund or credit to the processor of any tax paid by him with respect to articles exported pursuant to the provisions of Section 317 of the Tariff Act of 1930.

APPENDIX B

Provisions of Title 26, U. S. C. Dealing With Collection of Taxes By Distraint

Sec. 115. *Lien for Taxes.* (*a*) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. (Balance of Section deals with recording of lien and giving of releases.) (R. S. Sec. 3186; Mar. 1, 1879, C. 125, Sec. 3, 20 Stat. 331; Mar. 4, 1913, C. 166, 37 Stat. 1016; Feb. 26, 1925, C. 344, 43 Stat. 994; May 29, 1928, 8 a.m., C. 852, Title IV, Sec. 613, 45 Stat.)

116. *Distraint for Taxes.* If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with 5 per centum additional thereto, and interest as aforesaid, by distraint and sale, in the manner hereafter provided, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid. (Balance of Section deals with exempt property.) (R. S. Sec. 3187; June 2, 1924, 4:01 p.m., C. 234, Sec. 1016, 43 Stat. 343.)

117. *Same; Levy.* In such case of neglect or refusal, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property

and rights to property, except such as are exempt by Section 116 of this title, belonging to such person, or on which the said lien exists, for the payment of the sum due as aforesaid, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy. (R. S. Sec. 3188.)

118. *Same; Exhibit of Evidences Relating to Property.* All persons, and officers of companies or corporations, are required, on demand of a collector or deputy collector about to distrain or having distrained on any property, or rights of property, to exhibit all books containing evidence or statements relating to the subject of distraint, or the property or rights of property liable to distraint for the tax due as aforesaid. (R. S. Sec. 3189.)

119. *Same; Proceedings On.* When distraint is made, as aforesaid, the officer charged with the collection shall make or cause to be made an account of the goods or effects distrained, a copy of which, signed by the officer making such distraint, shall be left with the owner or possessor or such goods or effects, or at his dwelling or usual place of business, with some person of suitable age and discretion, if any such can be found, with a note of the sum demanded, and the time and place of sale; and the said officer shall forthwith cause a notification to be published in some newspaper within the county wherein said distraint is made, if a newspaper is published in said county, or to be publicly posted at the post office, if there be one within five miles nearest to the residence of the person whose property shall be distrained, and in not less than two other public places. Such notice shall specify the articles distrained, and the time and place for the sale thereof. Such time shall not be less than ten nor more than twenty days from the date of such notification to the owner or possessor of the property and the publication or posting of such notice as herein

provided, and the place proposed for the sale shall not be more than five miles distant from the place of making such distraint. Said sale may be adjourned from time to time by said officer, if he deems it advisable, but not for a time to exceed in all thirty days. (R. S. Sec. 3190.)

120. *Same; Sale of Property Subject to Tax.* When property subject to tax, but upon which the tax has not been paid, is seized upon distraint and sold, the amount of such tax shall, after deducting the expenses of such sale, be first appropriated out of the proceeds thereof to the payment of the tax. And if no assessment of such tax has been made upon such property, the collector shall make a return thereof in the form required by law, and the Commissioner of Internal Revenue shall assess the tax thereon. (R. S. Sec. 3191.)

121. *Same; Sale of Property; Purchase for United States.* When any personal property is advertised for sale under distraint as aforesaid, the officer making the seizure shall proceed to sell such property at a public auction, offering the same at a minimum price, including the expenses of making the levy and of advertising the sale, and if the amount bid for such property at the sale is not equal to the minimum price so fixed, the officer conducting the sale may declare the same to be purchased by him for the United States. The property so purchased may be sold by the collector within whose district the sale was made under such regulations as may be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury. The collector shall render to the Commissioner a distinct account of all charges incurred in such sales and, in case of resale, shall pay into the Treasury the proceeds as provided in Section 3210 of the Revised Statutes, as amended (R. S. 3192, as amended May 10, 1934, 11:40 a.m., C. 277, Sec. 508, 48 Stat.)

122. *Same; Restoration of Property on Payment Before Sale.* (This merely provides for return of property distrained upon if tax is paid prior to sale.) (R. S. 3193.)

123. *Same; Effect of Certificate of Sale.* In all cases of sale, as aforesaid, the certificate of such sale shall be prima-facie evidence of the right of the officer to make such sale, and conclusive evidence of the regularity of his proceedings in making the sale, and shall transfer to the purchaser all right, title, and interest of such delinquent in and to the property sold; and where such property consists of stocks, said certificate shall be notice, when received, to any corporation, company, or association of said transfer, and shall be authority to such corporation, company, or association to record the same on their books and records in the same manner as if transferred or assigned by the party holding the same, in lieu of any original or prior certificates, which shall be void, whether canceled or not. And said certificates, where the subject of sale is securities or other evidences of debt, shall be good and valid receipts to the person holding the same, as against any person holding, or claiming to hold, possession of such securities or other evidences of debt. (R. S. Sec. 3194.)

124. *Same; When Property Not Divisible.* (This deals with special case of indivisible property and allows sale of the whole even though its value exceeds amount of the tax. (R. S. Sec. 3195; June 2, 1924, 4:01 p.m., C. 234, Sec. 1031 (*a*), 43 Stat. 351; re-enacted Jan. 26, 1926, 10:25 a.m., C. 27, Title XI, Sec. 1128(a), 144 Stat. 124.)

125. *Real Estate; Sale to Satisfy Taxes.* When goods, chattels, or effects sufficient to satisfy the taxes imposed upon any person are not found by the collector or deputy collector, he is authorized to collect the same by seizure and sale of real estate. (R. S. Sec. 3196.)

126. *Same; Proceedings.* The officer making the seizure mentioned in Section 125 of this title shall give notice to the person whose estate it is proposed to sell by giving him in hand, or leaving at his last or usual place of abode, if he has any such within the collection district where said estate is situated, a notice, in writing, stating what particular estate is to be sold, describing the same with reasonable certainty, and the time when and place where said officer proposes to sell the same; which time shall not be less than twenty nor more than forty days from the time of giving said notice. The said officer shall also cause a notification to the same effect to be published in some newspaper within the county where such seizure is made, if any such there be, and shall also cause a like notice to be posted at the postoffice nearest to the estate seized, and in two other public places within the county; and the place of said sale shall not be more than five miles distant from the estate seized, except by special order of the Commissioner of Internal Revenue. At the time and place appointed, the officer making such seizure shall proceed to sell the said estate at public auction, offering the same at a minimum price, including the expense of making such levy, and all charges for advertising and an officer's fee of $10. (Balance of section deals with details of conducting sale.) (R. S. Sec. 3197; Feb. 27, 1877, C. 69, Sec. 1, 19 Stat. 248; Mar. 1, 1879, C. 125, Sec. 3, 20 Stat. 331; May 28, 1896, C. 252, 29 Stat. 179; Mar. 3, 1905, C. 1483, Sec. 1, 33 Stat. 1207; July 19, 1919, C. 24, Sec. 1, 41 Stat. 209.)

127. *Same; Certificate of Purchase; Deed.* (This provides for execution of deed by the collector to the purchaser.) (R. S. Sec. 3198.)

128. *Same; Deed Prima-Facie Evidence.* The deed of sale given in pursuance of Section 127 of this title shall be prima-facie evidence of the facts therein stated; and if the proceedings of the officer as set

forth have been substantially in accordance with the provisions of law, shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real estate thus sold at the time the lien of the United States attached thereto. (R. S. Sec. 3199.)

129. *Same; Place of Seizure (and Sale).* Any collector or deputy collector may, for the collection of taxes imposed upon any person, and committed to him for collection, seize and sell any of the property, real or personal (except property exempt from distraint and sale, under Section 3187 of the Revised Statutes, or any right or interest therein, of such person situated in any other collection district within the State in which such officer resides, notwithstanding the provisions of Section 3209 of the Revised Statutes; and his proceedings in relation thereto shall have the same effect as if the same were had in his proper collection district. (R. S. Sec. 3200; amended Jan. 26, 1926, 11:25 a.m., Title XI, Sec. 1129, 44 Stat. 125.)

130. *Same; Redemption Prior to Sale.* (This provides for return of property seized on payment of tax.) (R. S. Sec. 3201.)

131. *Same; Redemption After Sale.* (This provides for redemption after sale by payment to purchaser, within one year after the sale, of the purchase price with interest at 20% per annum.) (R. S. 3202.)

APPENDIX C

Penalty Provisions

Section 19(b) of the Agricultural Adjustment Act:

> "Sec 19. * * * (*b*) All provisions of law, including penalties, applicable with respect to the taxes imposed by Section 600 of the Revenue Act of 1926, and the provisions of Section 626 of the Revenue Act of 1932, shall, insofar as applicable and not inconsistent with the provisions of this title, be applicable in respect of taxes imposed by this title: * * * ."

Section 1114 of 1926 Revenue Act, applicable with respect to taxes imposed by Section 600 of that Act:

> "Sec. 1114. (*a*) Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who wilfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisioned for not more than one year, or both, together with the costs of prosecution.
>
> "(*b*) Any person required under this Act to collect, account for and pay over any tax imposed by this Act, who willfully fails to collect or truthfully account for and pay over such tax,

and any person who willfully attempts in any manner to evade or defeat any tax imposed by this Act or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

"(*c*) Any person who willfully aids or assists in, or procures, counsels, or advises, the preparation or presentation under, or in connection with any matter arising under, the internal-revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

"(*d*) Any person who willfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by Titles IV, V, VI, VII, VIII, and IX, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this subdivision for any offense for which a penalty may be assessed under authority of Section 3176 of the Revised Statutes, as amended, or for any offense for which a penalty has been recovered under Section 3256 of the Revised Statutes.

"(*e*) Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process. Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

"(*f*) The term 'person' as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

APPENDIX D

PROCESSING TAX PROVISIONS OF AGRICULTURAL ADJUSTMENT ACT, AS AMENDED, AS APPLIED TO RICE

SEC. 9. (*a*) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that any one or more payments authorized to be made under Section 8 are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; except that * * * (2) in the case of rice, the Secretary of Agriculture shall, before April 1, 1935, proclaim that rental or benefit payments are to be made with respect thereto, and the processing tax shall be in effect on and after April 1, 1935. * * * In the case of rice, the period from August 1 to July 31, both inclusive, shall be considered to be the marketing year. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (*b*). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all payments authorized under Section 8 which are in effect are to be discontinued with

respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: * * *

(*b*) (1) The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity, plus such percentage of such difference, not to exceed 20 per centum, as the Secretary of Agriculture may determine will result in the collection, in any marketing year with respect to which such rate of tax may be in effect pursuant to the provisions of this title, of an amount of tax equal to (A) the amount of credits or refunds which he estimates will be allowed or made during such period pursuant to section 15(c) with respect to the commodity (B) the amount of tax which he estimates would have been collected during such period upon all processing of such commodity which are exempt from tax by reason of the fact that such processings are done by or for a State, or a political subdivision or an institution thereof, had such processings been subject to tax. If, prior to the time the tax takes effect, or at any time thereafter, the Secretary has reason to believe that the tax at such rate, or at the then existing rate, on the processing of the commodity generally or for any designated use or uses, or on the processing of the commodity in the production of any designated product or products thereof for any designated use or uses, will cause or is causing such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then the Secretary shall cause an appropriate investigation to be made, and afford due notice and opportunity for hearing to interested parties. If thereupon the Secretary determines and proclaims that any such result will oc-

cur or is occurring, then the processing tax on the processing of the commodity generally or for any designated use or uses, or on the processing of the commodity in the production of any designated product or products thereof for any designated use or uses, shall be at such lower rate or rates as he determines and proclaims will prevent such accumulation of surplus stocks and depression of the farm price of the commodity, and the tax shall remain during its effective period at such lower rate until the Secretary, after due notice and opportunity for hearing to interested parties, determines and proclaims that an increase in the rate of such tax will not cause such accumulation of surplus stocks or depression of the farm price of the commodity. Thereafter the processing tax shall be at the highest rate which the Secretary determines will not cause such accumulation of surplus stocks or depression of the farm price of the commodity, but it shall not be higher than the rate provided in the first sentence of this paragraph. * * *

SPECIFIC TAX RATE—RICE

(3) For the period from April 1, 1935, to July 31, 1936, both inclusive, the processing tax with respect to rice shall be levied, assessed, collected, and paid at the rate of 1 cent per pound of rough rice. * * *

(6) (A) Any rate of tax which is prescribed in paragraph (2), (3), (4) or (5) of this subsection or which is established pursuant to this paragraph (6) on the processing of any commodity generally or for any designated use or uses, or on the processing of the commodity in the production of any designated product or products thereof for any designated use or uses, shall be decreased (including a decrease to zero) in accordance with the formulae, standards, and requirements of paragraph (1) of

this subsection, in order to prevent such reduction in the quantity of such commodity or the products thereof domestically consumed as will result in the accumulation of surplus stocks of such commodity or the products thereof or in the depression of the farm price of the commodity, and shall thereafter be increased in accordance with the provisions of paragraph (1) of this subsection but subject to the provisions of subdivision (B) of this paragraph (6).

(B) If the average farm price of any commodity, the rate of tax on the processing of which is prescribed in paragraph (2), (3), (4) or (5) of this subsection or is established pursuant to this paragraph (6), during any period of twelve successive months ending after July 1, 1935, consisting of the first ten months of any marketing year and the last two months of the preceding marketing year—

(*i*) is equal to, or exceeds by 10 per centum or less, the fair exchange value thereof, or, in the case of tobacco, is less than the fair exchange value by not more than 10 per centum, the rate of such tax shall (subject to the provisions of subdivision (A) of this paragraph (6) be adjusted, at the beginning of the next succeeding marketing year, to such rate as equals 20 per centum of the fair exchange value thereof.

(*ii*) exceeds by more than 10 per centum, but not more than 20 per centum, the fair exchange value thereof, the rate of such tax shall subject to the provisions of subdivision (A) of this paragraph (6) be adjusted, at the beginning of the next succeeding marketing year, to such rate as equals 15 per centum of the fair exchange value thereof.

(*iii*) exceeds by more than 20 per centum the fair exchange value thereof, the rate of such

tax shall (subject to the provisions of subdivision (A) of this paragraph (6) be adjusted, at the beginning of the next succeeding marketing year, to such rate as equals 10 per centum of the fair exchange value thereof.

(C) Any rate of tax which has been adjusted pursuant to this paragraph (6) shall remain at such adjusted rate unless further adjusted or terminated pursuant to this paragraph (6), until December 31, 1937, or until July 31, 1936, in the case of rice.

(D) In accordance with the formulae, standards, and requirements prescribed in this title, any rate of tax prescribed in paragraph (2), (3), (4) or (5) of this subsection or which is established pursuant to this paragraph (6) shall be increased.

(E) Any tax, the rate of which is prescribed in paragraph (2), (3), (4) or (5) of this subsection or which is established pursuant to this paragraph (6), shall terminate pursuant to proclamation as provided in section 9 (a) of this title or pursuant to section 13 of this title. Any such tax with respect to any basic commodity which terminates pursuant to proclamation as provided in section 9 (a) of this title shall again become effective at the rate prescribed in paragraph (2), (3), (4) or (5) of this subsection, subject however, to the provisions of subdivisions (A) and (B) of this paragraph (6), from the beginning of the marketing year for such commodity next following the date of a new proclamation by the Secretary as provided in section 9 (a) of this title, if such marketing year begins prior to December 31, 1937, or prior to July 31, 1936, in the case of rice, and shall remain at such rate until altered or terminated pursuant to the provisions of section 9 or terminated pursuant to section 13 of this title. * * *

(G) If the applicability to any person or circumstances of any tax, the rate of which is fixed in pursuance of this paragraph (6), is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be levied, assessed, collected, and paid (in lieu of all rates of tax fixed in pursuance of this paragraph (6) with respect to all tax liabilities incurred under this title on or after the effective date of each of the rates of tax fixed in pursuance of this paragraph (6)), rates of tax fixed under paragraph (2), (3), (4) or (5), and such rates shall be in effect (unless the particular tax is terminated pursuant to proclamation, as provided in section 9 (a) or pursuant to section (13) until altered by Act of Congress; except that, for any period prior to the effective date of such holding of invalidity, the amount of tax which represents the difference between the tax at the rate fixed in pursuance of this paragraph (6) and the tax at the rate fixed under paragraphs (2), (3), (4) and (5) shall not be levied, assessed, collected, or paid.

RICE—SPECIAL RULE

(7) In the case of rice, the weight to which the rate of tax shall be applied shall be the weight of rough rice when delivered to a processor, except that, where the producer processes his own rice, the weight to which the rate of tax shall be applied shall be the weight of rough rice when delivered to the place of processing. * * *

(*c*) For the purposes of part 2 of this title, the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period

specified in section 2; and, in the case of all commodities where the base period is the pre-war period, August 1909 to July 1914, will also reflect interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during said base period; and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture. The rate of tax upon the processing of any commodity, in effect on the date on which this amendment is adopted, shall not be affected by the adoption of this amendment and shall not be required to be adjusted or altered, unless the Secretary of Agriculture finds that it is necessary to adjust or alter any such rate pursuant to section 9 (a) of this title.

(*d*) As used in part 2 of this title— * * *

(7) In the case of rice—

(A) The term "rough rice" means rice in that condition which is usual and customary when delivered by the producer to a processor.

(B) The term "processing" means the cleaning, shelling, milling (including custom milling for toll as well as commercial milling), grinding, rolling, or other processing (except grinding or cracking by or for the producer thereof for feed for his own livestock, cleaning by or directly for a producer for seed purposes, and drying) of rough rice; and in the case of rough rice with respect to which a tax-payment warrant has been previously issued or applied for by application then pending, the term "processing" means any one of the above mentioned processings or any preparation or handling in connection with the sale or other disposition thereof.

(C) The term "co-operating producer" means

any person (including any share-tenant or share-cropper) whom the Secretary of Agriculture finds to be willing to participate in the 1935 production-adjustment program for rice.

(D) The term "processor," as used in subsection (b-1) of section 15 of this title, means any person (including a co-operative association of producers) engaged in the processing of rice on a commercial basis (including custom milling for toll as well as commercial milling).

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1935

No. 537

RICKERT RICE MILLS, INC.,
PETITIONER,

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA,
RESPONDENT.

MOTION FOR INJUNCTION TO PRESERVE STATUS QUO

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Of Counsel.
Houston, Texas.

No.....

IN THE

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TO THE HONORABLE BENJAMIN N. CARDOZO, *Associate Justice of the Supreme Court of the United States:*

Comes now Rickert Rice Mills, Inc., by its counsel, Homer L. Bruce and John P. Bullington, and respectfully states that petitioner on October 25, 1935, brought a bill in equity in the United States District Court for the Eastern District of Louisiana, New Orleans Division, entitled Rickert Rice Mills, Inc., Plaintiff, v. Rufus W. Fontenot, Individually and as

Acting United States Collector of Internal Revenue for the District of Louisiana, Defendant, and numbered 321 in Equity in the New Orleans Division of said court. In its bill of complaint in said cause petitioner prayed for a temporary restraining order to be issued immediately, and for a preliminary injunction after notice to the respondent, and for a permanent injunction on the final hearing of said cause, enjoining the respondent from assessing or collecting or attempting to assess or collect from the petitioner in any manner whatsoever, whether by lien or jeopardy or distraint proceedings, in court or otherwise, any processing taxes levied under and pursuant to the Act of the Congress of the United States known as the Agricultural Adjustment Act, and amendments thereto, or purported to be levied by said Act, upon the petitioner for the processing of rice during the month of September, 1935, and for subsequent months, and any interest or penalty on account of petitioner's failure to pay said processing tax, and from imposing or giving notice of intention to impose any lien for said taxes upon the property, real or personal, of petitioner. Said application for preliminary injunction was set down for hearing before the judge of said District Court at New Orleans on Monday, October 28, 1935. Notice thereof was duly waived by respondent. Prior to said hearing respondent filed his motion to dismiss said bill, copies of which motion and also of petitioner's bill of complaint are contained in the record in this cause now brought to this Court on petition for certiorari.

After a hearing on petitioner's motion for preliminary injunction and on respondent's motion to dismiss, the Honorable John McDuffie, acting judge of said District Court, on October 28, 1935, refused petitioner's motion for preliminary injunction, granted the motion of respondent to dismiss the said bill of complaint, and dismissed the said bill of complaint, to which petitioner herein duly excepted. Thereafter on the 29th day of October, 1935, the petitioner herein in open court and in the presence of counsel for respondent filed its petition for an appeal, which was duly allowed by the said judge of the United States District Court who tried said cause, and filed at the same time its assignments of error, and also a cost bond was duly filed and approved by the said judge of said District Court. At the time petitioner presented its said petition for appeal, it also petitioned said judge of the District Court to grant it an injunction enjoining the respondent in the manner set out in its request for a preliminary injunction in its bill of complaint, pending the appeal of petitioner to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, but the said judge of said District Court refused petitioner's said petition and refused to grant petitioner said injunction pending said appeal.

Petitioner perfected its appeal to the Circuit Court of Appeals for the Fifth Circuit, making said cause returnable at New Orleans, Louisiana, as provided by law, and duly caused to be prepared a transcript of the record in said cause and filed the

same, in accordance with law and within the time allowed by law, in the office of the clerk of said Circuit Court of Appeals at New Orleans, Louisiana, and said cause was duly docketed in that Court as "Rickert Rice Mills, Inc., Appellant, v. Rufus W. Fontenot, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana, No. 7937."

On November 4, 1935, after notice to respondent, petitioner filed in said Circuit Court of Appeals its motion for a preliminary injunction pending the hearing of its appeal enjoining respondent from assessing or collecting from petitioner said taxes. The Circuit Court of Appeals on November 5, 1935, denied petitioner's said motion, stating in its opinion that

> "the taxpayer has a remedy at law to recover back any taxes illegally exacted, and, further that the provisions of the Act as amended deprive the Court of jurisdiction to grant injunctive relief."

Both in the District Court and in the Circuit Court of Appeals petitioner offered to give such security as the court might require in the event the court should ultimately decide the cause against petitioner.

Petitioner has filed in the Supreme Court of the United States its petition for a writ of certiorari in this cause and the record therein.

In said bill of complaint petitioner alleged that the amount of processing taxes on account of the

rice processed by the petitioner during the month of September, 1935, was $57,275.42, and that under said Agricultural Adjustment Act petitioner was required to pay said amount to respondent on or before October 30, 1935, and that respondent was charged with the duty of collecting said tax, and if said tax were not paid on or before October 30, 1935, respondent would assess said tax against the petitioner and serve upon petitioner notice and demand for the payment thereof and would allow petitioner ten days from receipt of such notice within which to pay the same; that in the event said tax should not be paid within said time, respondent would assess against petitioner a penalty equal to 5 per cent of the amount of the tax and interest on the tax at the rate of 1 per cent per month from the due date of the tax until paid; that if the petitioner failed to pay the tax within said ten days, respondent would proceed to collect the tax, penalty and interest by filing a notice of lien on all of petitioner's property and by distraining upon and selling such of petitioner's property as might be necessary to realize the amount of said tax, penalties and interest; and that additional processing taxes for months subsequent to September, 1935, will accrue and be assessed against and collected from the petitioner in the same manner as the tax for the month of September.

Petitioner alleged that the said processing tax was illegal and unconstitutional, and violated various provisions of the Constitution of the United States in many particulars, more fully set forth in peti-

tioner's bill of complaint. The petitioner also alleged that under an amendment to said Agricultural Adjustment Act approved on August 24, 1935, a Section 21(d) was added to said Act, which section provides in substances that petitioner should be allowed no recovery of any of said taxes paid, if the same should be illegal or unconstitutional, unless petitioner established to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner should so find, that neither petitioner nor any person directly or indirectly under petitioner's control or having control over petitioner, has, directly or indirectly, included such amount in the price of the rice with respect to which it was imposed or of any article processed from the rice with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing rice, and that the price paid by the petitioner or such person for said rice was not reduced by any part of such amount. Petitioner in said bill of complaint, alleged, as more fully set out therein, that under said Section 21 (d) it had no adequate remedy at law by which it could recover any part of said taxes if same were unconstitutional and illegal, and that it was impossible, owing to the peculiar conditions existing in the rice milling industry and in the purchase, milling and sale of rice, for petitioner to discharge the burden placed upon it by said Section 21 (d), all as more fully set out in petitioner's bill of complaint.

Petitioner further alleged that in said amendment of August 24, 1935, a new section known as Section 21 (a) was added to said Agricultural Adjustment Act, which in substance provided that no suit to enjoin the collection of said processing taxes should be maintained in any court. Petitioner further alleged that said section was not intended to apply, and did not apply, to the injunction prayed for by petitioner, inasmuch as petitioner had no adequate remedy at law. Petitioner further alleged that if said section should be interpreted as prohibiting the injunction prayed for by petitioner, then the said section, together with the other provision of said Act, was invalid and in violation of the Fifth Amendment to the Constitution, that no person shall be deprived of his property without due process of law, in that said illegal and unconstitutional taxes would be collected from petitioner and petitioner would have no remedy by which it could recover taxes and would have no remedy to prevent the collection of said unlawful taxes and would be forever deprived of the right to test the constitutionality of said taxes.

Petitioner further alleged that said Section 21 (d) denied the petitioner a complete and adequate remedy at law for the various other reasons set forth in said bill of complaint.

At the hearing before the district judge petitioner introduced in evidence the affidavit of W. M. Reid, executive secretary of The Rice Millers' Association, a man of twenty-six years' experience in the rice business, in which affidavit he set out fully and